6. Howard 201–
13 Peters.

Judge Day

SUPREME COURT OF THE UNITED STATES.

No. 341.

A. R. ORCHARD AND AMANDA ORCHARD, APPELLANTS,

vs.

JOHN HUGHES AND ELIZA HUGHES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEBRASKA.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

No. 341.

A. R. ORCHARD AND AMANDA ORCHARD, APPELLANTS,

vs.

JOHN HUGHES AND ELIZA HUGHES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEBRASKA.

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1 UNITED STATES OF AMERICA,
Territory of Nebraska, ss:

Proceedings had in the supreme court of the Territory of Nebraska, at the August special term thereof, begun and held at the capital of said Territory, on the 11th day of August, one thousand eight hundred and sixty-three, and at which were present the following named officers of said court:

Honorable Wm. P. Kellogg, chief justice; honorable Elmer S. Dundy, judge of 2nd district; P. W. Hitchcock, esq., marshal; D. L. Collier, esq., att'y for U. S.; J. H. Kellom, esq., clerk of said court, by his deputy, H. M. Dickinson, esq.

JOHN HUGHES and ELIZA HUGHES, appellees.
vs.
A. R. ORCHARD and AMANDA ORCHARD, appellants.

Be it remembered, that on the 19th day of August, one thousand eight hundred and sixty-three, Daniel Gantt, esq., master in chancery, came into the said supreme court and filed in the office of the said clerk of said court his report of sale, which appears of record in words and figures follows, to wit:

2 In the supreme court of the Territory of Nebraska.

JOHN HUGHES and ELIZA HUGHES, appellees,
vs.
A. R. ORCHARD and AMANDA ORCHARD, appellants. } In chancery.

To the honorable the judges of the supreme court of the Territory of Nebraska.

Whereas, by a decretal order of this court, made in the above-entitled cause, bearing date the 22d day of June, A. D. 1861, it was, *inter alia*, ordered and decreed that John C. Hileman, a special master appointed, proceed to sell the lands and tenements in the bill of complaint mentioned in this cause; and whereas, by a subsequent decretal order of this court, it appearing to said court that the said John C. Hileman had removed from this Territory, and that by reason thereof such sale could not be made by him, it was, *inter alia*, ordered, adjudged, and decreed that Daniel Gantt, a special master appointed, proceed to execute said decree aforesaid, and in all respects do and perform the duties of special master enjoined in said decree:

Now, therefore, I, Daniel Gantt, the said special master, do respectfully certify and report, that in pursuance and by virtue of the said decretal orders, and having been charged by the solicitors for complainants or appellees with the execution thereof, I advertised the said premises to be sold by me at the front door of the court-house in Omaha, in Douglas county, Nebraska Territory, on the ninth day of June, A. D. 1863, by causing notice of the time and place of said sale, and of the description of said premises to be printed and published, for at least thirty days immediately preceding said sale, in the Nebraska Republican, a newspaper printed and published in said county of Douglas, Nebraska Territory; and as directed by law, and the rules of this court, the said premises, being lot number one, block number one hundred and sixty-seven, in the city of Omaha, in the county of Douglas, and Territory of Nebraska, together with the improvements on said lot.

I further certify and report that I attended at the time and place so as aforesaid fixed for the said sale, and offered all the said premises for sale at public auction to the highest bidder; and the same was then and there struck off to A. R. Orchard at and for the sum or price of fifteen hundred and fifty dollars, but the said A. R. Orchard, after said premises were so struck off to him, having had over three-quarters of an hour to comply with the terms and conditions of said sale, together with notice from me publicly at the time the same was so struck off to him, that if such compliance were not had in said time I would again put up said premises at the next highest bid, and the said A. R. Orchard, having utterly failed so to comply with the terms and condition of said sale, I again, at the expiration of the time, put up said premises at the next highest bid, and then and there the said premises were struck off to John J. Redick, at and for the price or sum of fifteen hundred and twenty-five dollars, that being the highest and best price or sum bidden for said premises, with a compliance of the terms and conditions of said sale.

I have retained out of said purchase-money the sum of one hundred and fifty-nine dollars and eighty-five cents, being the amount of my fees, commissions, and disbursements on said sale, as will appear by reference to the statement of items thereof annexed to this my report. And I have paid to the solicitors of said appellees or complainants the sum of thirteen hundred and sixty-five dollars and fifteen cents, being the balance of the proceeds of said sale, after deducting the amount of fees, commissions and disbursements as aforesaid, for which I have taken a receipt.

I further certify and report that the sum of $1,365 15, so as aforesaid paid to the solicitors for appellees, is insufficient to pay the debt reported due to said appellees, with interest thereon and costs, and that the amount of such deficiency is the sum of five hundred and nineteen $\frac{23}{100}$ dollars.

All which is respectfully submitted.

DANIEL GANTT,
Master in Chancery.

Dated Aug. 15th, 1863.

Statement of items.

Costs taxed in district court	$102 60
Clerk's fees in supreme court	14 00
Commissions	18 25
Report of sale	1 00
Stamp and deed	2 00
Sale	1 00
Printer's advertising sale	21 00
	$159 85

And thereupon afterwards, to wit, on the 25th day of August, 1863, was filed in the clerk's office of said supreme court, the affidavit of A. R. Orchard, which is in words and figures following, to wit:

In the supreme court of the Territory of Nebraska.

ANDREW R. ORCHARD *et ux*, appellants,
vs.
JOHN HUGHES *et ux.*

TERRITORY OF NEBRASKA,
County of Douglas, ss:

Andrew R. Orchard, being duly sworn, says, he had no notice of any application to this court for an order to empower Daniel Gantt to sell the mortgaged premises mentioned in the decree in this cause; 6 that the hour at which notice was, by said Gantt, given that said sale of said premises would be had was one o'clock in the afternoon; that the premises were not offered for sale until two and a half o'clock in said afternoon; that divers persons, and among others, Samuel A. Orchard, attended at the time and place mentioned in said notice for said sale, for the purpose of bidding for said premises at the same; that supposing, from the same not being offered until after two o'clock, that such sale was adjourned, they left about that hour without bidding or being present at the same, and deponent believes if said premises are put and fairly sold they will bring at least 25 per cent. more than they did at said sale. That deponent had no knowledge, until about four months ago, that any assignment of the note and mortgage on which this suit is based hadbeen, by the complainants therein, assigned to one Redick; that although said Redick at one time told deponent so, he afterwards virtually denied it, and so deceived deponent, when it was important for him to present the point to the court. Deponent says such assignment was made when this suit was pending in the district court.

A. R. ORCHARD.

7 Subscribed and sworn to this 25th day of August, 1863.

JOHN McCARTHY,
Justice of the Peace.

And thereupon, to wit, on the same day and year aforesaid, was filed the affidavit of Sam. A. Orchard, the same being in words and figures following, to wit:

In the supreme court of the Territory of Nebraska.

ANDREW R. ORCHARD *et ux*, appellants,
vs.
JOHN HUGHES *et ux.*

TERRITORY OF NEBRASKA,
County of Douglas, ss:

Samuel A. Orchard, being duly sworn, says he, on the 9th day of June last, personally attended at the court-house, in said county, and the south door thereof, from one o'clock in the afternoon till after two o'clock on said day, prepared, expecting, and desiring to bid for the premises decreed in this cause to be sold, and advertised then and there to be sold; but the said premises were not, during that time, offered for sale; that supposing said sale had been put off for some reason, deponent left said court-house, and so was deprived of an opportunity of bidding for said premises, which he was and is
8 prepared and anxious to do and to purchase when fairly offered.

SAM. A. ORCHARD.

Subscribed and sworn to before me this 25th day of August, 1863.

JOHN McCARTHY,
Justice of the Peace.

And thereupon, on the same day and year aforesaid, was filed the affidavit of Daniel Gantt, esq., which is in words and figures following, to wit:

In the supreme court of the Territory of Nebraska.

ANDREW R. ORCHARD *et ux*, appellants,
vs.
JOHN HUGHES *et ux*, appellees.

THE TERRITORY OF NEBRASKA,
Douglas County, ss:

Daniel Gantt, being duly sworn, says, that on the 9th day of June, 1863, at or about one o'clock in the afternoon, according to his time-piece, which he believed to have the correct time, he attended at the south door of the court-house, in the city of Omaha, said county, to sell the property of A. R. Orchard, advertised by him in
9 pursuance and by virtue of a decretal order of the supreme court of the Territory of Nebraska; that on attending at said court-house he found the judge of the district court of the first judicial district of said Territory considering an application for an injunction to stay said sale; that upon the request of said judge he held said sale open until some time about two o'clock, or it may be a little after that time, when said judge rendered his decision against said application, and said property was then knocked off to said A. R. Orchard for the sum of $1,550 00; that he gave said Orchard

fifty minutes' time to comply with the terms and conditions of said sale, and announced publicly, at the same time, that if the same were not complied with he would again put up said property at the next highest bid; that said Orchard failed so to comply, and that after the expiration of the time allowed said Orchard, he again put up said property at the next highest bid, and knocked off the same to John J. Redick for the sum of $1,525 00; and that the said property was so knocked off to said John J. Redick before the hour of four o'clock of said afternoon.

DAN. GANTT.

Subscribed in my presence, and sworn to before me, this 25th day of August, A. D. 1863.

JOHN McCARTHY,
Justice of the Peace.

10 And thereupon, on the same day and year aforesaid, was filed the affidavit of Clinton Briggs, esq., in words and figures following, to wit:

In supreme court, Territory of Nebraska.

ANDREW R. ORCHARD and WIFE, appellants,
vs.
JOHN HUGHES and WIFE, appellees.

TERRITORY OF NEBRASKA,
Douglas County, ss:

Clinton Briggs, being by me first duly sworn, deposes and says, that he is one of the solicitors for said appellees; and further says, that at the special term of this court held in November, 1862, said appellees made application to the court to have Daniel Gantt appointed a special master to sell the mortgaged premises in this case, in the place of John C. Hileman, who had removed from the Territory; that Messrs. Sapp & Woolworth appeared as solicitors for said appellants, and in open court opposed the application, and insisted that further time should be given appellants' counsel in which to prepare to resist the application, and that such time was given appel-
11 lants by the court; that after several days had elapsed the said application was again called up by appellees' solicitors, and was by them argued; whereupon the said solicitors for appellants, or at least one of them, appeared and argued at some considerable length against the application.

CLINTON BRIGGS.

Subscribed in my presence, and sworn to before me, this 25th day of August, 1863.

DANIEL GANTT,
Justice of the Peace.

And thereupon, on the same day and year aforesaid, was filed, by J. M. Woolworth, esquire, solicitor and of counsel for appellant, exceptions, which are of record, in words and figures following, to wit:

In the supreme court of the Territory of Nebraska.

ANDREW R. ORCHARD *et ux.* appellants,
vs.
JOHN HUGHES *et ux*, appellees.

Exceptions taken by Andrew R. Orchard, one of the above-named appellants, to the general report of Daniel Gantt, as a special master of the sale by him of the mortgaged premises.

12 First exception. For that by the decree of this honorable court, pronounced at the June (1861) term thereof, it was, among other things, ordered that John C. Hileman, a special master appointed by this court, sell the said premises, and that the order of this court, made at the November special (1862) term, vacating the said portion of said decree, and ordering that Daniel Gantt, as master, sell said premises, was made without any notice to or hearing from this exceptant, as by the records of this honorable court in that behalf will, on reference, appear.

Second exception. For that the said Daniel Gantt hath not accompanied his said report with any copy, nor with any proof of the publication of the notice of the sale of the said mortgaged premises.

Third exception. For that it appears in and by said report that the said Daniel Gantt hath retained the costs of this suit in his own possession, and doth now hold the same, whereas the same should have been by him paid, either to the prevailing party or the clerk of this court, and receipts taken therefor and filed by him with his said report.

Fourth exception. For that the said Daniel Gantt, so far as appears by or from his said report, hath not taken from the solicitor of the complainant any receipt for the sums paid to him.

13 Fifth exception. For that, as appears by affidavit herewith filed, the said sale did not take place at the hour specified in the notice of sale in that behalf, but was delayed at least one and one-half hour therefrom, by means whereof parties desirous of purchasing at said sale were induced to and did suppose said sale was adjourned, and left the place of sale without bidding at the same.

Sixth exception. For that, as appears by affidavit herewith filed, that pending this suit in the district court, the note and mortgage on which it was founded were assigned by the complainants to one Redick, who used such language and conduct as led this exceptant to suppose no such assignment had been made; that the said Redick has never been made a party to this suit, but has prosecuted the same for his own benefit in the names of the said appellees.

Wherefore this appellant doth except to the said report, and appeals to the judgment of this court.

JAS. M. WOOLWORTH,
Solicitor, and of Counsel for Appellant.

And thereupon, at a special term of said supreme court, and on the 26th day of Aug., 1863, present, honorable Wilson B.
14 Keilogg, chief justice, honorable Elmer S. Dundy, judge 2d

judicial district, David L. Collier, esq., attorney for United States, Phineas W. Hitchcock, esq., marshal, and John H. Kellom, esq., clerk of said court, by his deputy, Hiram M. Dickinson, esq., the following proceedings were had, to wit:

JOHN HUGHES and ELIZA HUGHES, appellees,
vs.
A. R. ORCHARD and AMANDA ORCHARD, appellants.

In the supreme court of the Territory of Nebraska.

On motion of Redick & Briggs, solicitors for appellees, this cause came on to be heard upon the report of sale made by Daniel Gantt, special master, in pursuance and by virtue of a decretal order of this court, bearing date the 22d day of June, 1861, and an order bearing date November 21st, 1862, issued out of this court; and the court having fully examined all the proceedings of said special master, and it appearing to the satisfaction of the court that the said proceedings and sale are in all respects according to law and the rules of this court, it is hereby ordered, adjudged, and decreed by this
15 court that the said proceedings and sale be, and the same are hereby, ratified and confirmed; and the said special master is hereby ordered to make to the purchasers of the said premises the proper deed for the same. And it is further ordered that execution issue for the balance due the said appellees against the said appellants, A. R. Orchard, after deducting the proceeds of said sale, to wit, the further sum of $519\frac{21}{100}$, with interest from the 17th day of August, A. D. 1863. And thereupon came the said appellants into this court, and during the session thereof, by their counsel, and in open court, pray an appeal from this order of the Supreme Court of the United States, which appeal is hereby allowed.

WM. P. KELLOGG,
Chief Justice.
ELMER S. DUNDY,
Judge, &c.

And thereupon afterward, to wit, on the 28th day of August, 1863, was filed the bond of A. R. Orchard, the same being in words and figures following, to wit:

Know all men by these presents that we, Andrew R. Orchard and Joel T. Griffin, are held and firmly bound unto John Hughes
16 and Eliza Hughes in the just and full sum of one thousand five hundred dollars, to be paid to the said John Hughes and Eliza Hughes, their executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Signed and sealed this 26th day of August, 1863.

Whereas lately at a special term of the supreme court of the Territory of Nebraska, in a suit depending in the said court between Andrew R. Orchard and Amanda, his wife, appellants, and John Hughes and Eliza, his wife, appellees, against the said appellants,